



ABORIGINAL PEOPLES AND CANADIAN LAW

Volume One: Before Entrenchment

**Darlene Johnston
Faculty of Law
University of Toronto**

Fall 2004

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Volume One: Before Entrenchment

A. People on Place

- | | |
|----------------------------------|---|
| 1. Aboriginal Visions of Land | 1 |
| 2. An Anishinabek Creation Story | 4 |

B. Joining Hands with the English

- | | |
|---|----|
| 1. Minivivana's Speech | 8 |
| 2. The Royal Proclamation | 10 |
| 3. The Treaty of Niagara, 1764 | |
| a. Sketch of Wampum Belts Delivered at Niagara | 12 |
| b. English Rendition of the Treaty of Niagara | 13 |
| c. Anishinabek Rendition of the Treaty of Niagara | 18 |
| 4. Simcoe's Speech to the Western Indians, 1792 | 20 |

C. The Marshall Legacy

- | | |
|--------------------------------|----|
| 1. Johnson v. M'Intosh (1823) | 23 |
| 2. Worcester v. Georgia (1832) | 30 |

D. Lord Watson's Legacy

- | | |
|--|----|
| 1. St. Catherine's Milling v. The Queen (1889) | |
| a. Treaty No. 3: The Negotiations | 51 |
| b. Treaty No. 3: The Text | 57 |
| c. The Privy Council Decision | 61 |

E. Between the Dominion and the Provinces

- | | |
|--------------------------------|-----|
| 1. R. v. Hill (1907) | 69 |
| 2. R. v. Jim (1915) | 74 |
| 3. R. v. Martin (1917) | 76 |
| 4. R. v. Wesley (1932) | 78 |
| 5. Re Eskimo (1939) | 89 |
| 6. Francis v. The Queen (1956) | 106 |
| 7. R. v. Sikyea (NWTCA, 1964) | 115 |
| 8. R. v. Sikyea (SCC, 1964) | 126 |
| 9. R. v. George (1966) | 129 |

F. Bringing Marshall Home

- | | |
|--|-----|
| 1. R. v. White and Bob (December 15, 1964) | 138 |
| 2. Calder v. A.G. of British Columbia (January 31, 1973) | 160 |

G. Section 88: The End of the Enclave?

- | | |
|--|-----|
| 1. Cardinal v. Attorney-General of Alberta (June 29, 1973) | 176 |
| 2. Natural Parents v. Supt. of Child Welfare (October 7, 1975) | 192 |
| 3. Kruger and Manuel v. R. (May 31, 1977) | 212 |
| 4. Four B Manufacturing (December 21, 1979) | 219 |
| 5. R. v. Sutherland (June 27, 1980) | 230 |
| 6. R. v. Taylor and Williams (October 16, 1981) | 239 |

A. People on Place

1. Aboriginal Visions of Land

James (Sakej) Youngblood Henderson, Majorie L. Benson, Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Carswell, 2000) pp.406-412.

Out of the sounds of the life forces in the ecology, the structure of Aboriginal languages of law is centred on the process of being or sustaining a shared world-view, a cognitive solidarity, and a tradition of responsible action. That world-view creates a series of visual descriptions clearly identifiable within the space and with specific boundaries and uses embedded in the original languages. Out of these descriptions comes a specialized cognitive map of their space or “territory” with paths of movement and cycles of existence.

Aboriginal order is based on the law of belonging to an ecological space. It is not a race-based law. It is usually based on kinship ties, specialized access to resources, and a high degree of social equality. Aboriginal people do not speak of living “there”, rather, each family or person “belongs” to the space or territory. Belonging is directly tied linguistically and experientially to a space as well as to shared knowledge. Belonging to a space, more than just living in a place or using its resources is attendant with benefits and obligations. Belonging is a special responsibility. Sharing and mobility discourage the accumulation of inessential resources, while relationships shape law, legal choices, placement and ultimately life.

While the Aboriginal order is based on an extended family-centred organization, it is not an isolated or stationary organization. Aboriginal peoples live and work in different places, not travelling randomly, but travelling to the resources to create and harvest bio-diversity and to trade. Mobility among Aboriginal peoples is not recent, nor was it introduced by modern means of travel; it was a sustainable way of life.

Across countless generations, comforted by the safety of Aboriginal languages, elders and storytellers have revealed the principles of Aboriginal law. In different languages, at various length and details, these oral teachings give form and context to the law. These laws tell of a sacred world transforming into a consensual order. Many laws exist within these teachings or stories, responding to the noblest understandings of Aboriginal world-views and thoughts on the proper way to live in a dynamic and changing environment.

Aboriginal consciousness and land laws are reflected in the law of belonging to a place that acknowledges the ability of the forces and resources in a space to move the spirit and the mind. Aboriginal consciousness honours processes and relationships rather than fixed rules, which leads to an understanding and acceptance of the interrelationships, expressive energies, and experiences of an ecological place. Awareness of the generative order is the sources of all Aboriginal law. To understand the shared spatial order of any Aboriginal nation is to identify the Aboriginal law and traditions, and the legal processes of linguistic responsibilities, descriptions and pathways. To understand the order is to live within it, learn its teachings, and to act in accordance with the teachings. Every Aboriginal language speaker knows the normative order and how to maintain, protect, and renew the land. Such knowledge is fundamental to their identity, personality and humanity. It must be noted again that it is difficult to separate one indigenous concept from another when trying to describe Indigenous peoples’ relationship to their lands, territories and resources.

...

How Aboriginal languages and law appropriate a space and attach responsibilities to it also reveals their ecological consciousness. Their notion of self does not end with their flesh, but continues with the reach of their senses into the land itself. Their notion of the space is more than vision; it includes the other non-visual senses. Thus, they can speak of the land as their flesh; they are their environments.

Many of these oral teachings have been translated into English, some more accurately than others. Paula Gunn Allen has translated the unifying vision of land in these teachings:

We are the land. To the best of my understanding, there is the fundamental idea embodied in Native American life and culture... . More than remembered, the earth is the mind of the people as we are the mind of the earth. The land is not really the place (separate from ourselves) where we act out the drama of our isolate destinies. It is not a means of survival, a setting for our affairs, a resource on which we draw in order to keep our own act functioning. It is not the ever-present "Other" which supplies us with a sense of "I". It is rather a part of our being, dynamic, significant, real. It is ourselves, in as real a sense as such notion as "ego, libido" or social network, in a sense more real than any conceptualization or abstraction about the nature of human being can ever be... . Nor is this relationship one of mere "affinity" for the earth. It is not a matter of being "close to nature." The relationship is more one of identity, in the mathematical sense, than of affinity. The Earth is, in a very real sense, the same as ourself (or selves).

Leroy Little Bear of the *Kainaiwa* (Blood Tribe) of the Blackfoot Confederacy has translated a similar principle that the land was considered the mother, the giver of life:

Tribal territory is important because the Earth is our Mother (and this is not a metaphor: it is real). The Earth cannot be separated from the actual being of Indians. The Earth is where the continuous and/or repetitive process of creation occurs. It is on the Earth and from the Earth that cycles, phrases, patterns, in other words, the constant flux and motion can be observed and experienced. In other words, creation is a continuity, and if creation is to continue, then it must be renewed, and consequently, the renewal ceremonies, the telling and re-telling of the creation stories, the singing and re-singing of songs, which are the humans' part in maintenance of creation. Hence, the annual sundance, the societal ceremonies, the unbundling of medicine bundles at certain phases of the year. All of these are interrelated aspects of happenings that take place on and within Mother Earth.

...

Aboriginal world view requires a coming into a relationship with the ecology; situating Aboriginal law signifies one's discovery of what there is in one's world and self that is sacred and spiritual. Some relationships of a space are produced through ancient agreements and renewal ceremonies with the "keepers" of the forces. These ecological covenants determine the law and customary actions of the people toward the resources. Though these spaces often appear to guests as "natural," to the Aboriginal people they are places created by agreements. Other spaces are ordered by ceremonies and rituals that reflect the teaching of the covenants and are required for renewal of the resources. The entire community's daily existence is based on the spatial concerns of shared resources, and on the equitable allocation of resources. Aboriginal peoples do not conceptualize managing the resources; rather, they manage their space. Their spatial consciousness, rather than the intentions or will of those families who nourished and protected the resource, shapes cultural and resource utilization and innovation.

A council of elders with consultation of all the extended families equitably divides the prime spaces of an ecology once or twice a year. Aboriginal law allocates use of spaces based on actual participation; the spaces are allocated so that general community livelihood is ensured. The sense of community solidarity is enhanced not only by Aboriginal law, but also by a responsible family acquiring secure “rights” to certain spaces or resources.

Far from being an ideological construct or a fungible commodity, the Aboriginal vision of land is a shared and sacred ecological space. It is an ecological proprietary legal order. Upon being asked to sign a land cession treaty, a Blackfoot chief summarized the ecological proprietary legal order and rejected the idea of land as a commodity:

Our land is more valuable than your money. It will last forever. It will not even perish by the flames of fire. As long as the sun shines and the waters flow, this land will be here to give life to man and animals. We cannot sell the lives of men and animals; therefore we cannot sell this land. It was put there for us by the Great Spirit and we cannot sell it because it does not belong to us. You can count your money and burn it within the nod of a buffalo’s head, but only the Great Spirit can count the grains of sand and the blades of grass on these plains. As a present to you, we will give you anything we have that you can take with you; but the land, never.

Generally, the Aboriginal law manifests many different visions of land tenure derived from the unifying principle and ecological proprietary order. These laws can be translated into a linguistic world-view or “landscape” that defines a concept of territory or land, but typically they describe a concept of space, of different realms enfolding into a sacred space. Their mother, the earth, is a series of ecological spaces; each filled with resources, sights and sounds, and memories.

As such principles illustrate, an Aboriginal world-view is a spatial rather than a material consciousness. This spatial consciousness is reflected in the Gitksan chiefs’ 1884 petition to the Government of Canada characterizing their territory as similar to an animal, with the villages its heart. The wrongful occupation of a part of their territory was conceptualized as cutting off their foot. Such a vision is reflected in the vision of the territory of the Blackfoot Confederacy as an old man.

Aboriginal space or territory is never at rest: it is assumed eternal, yet remains tolerant to flux. It is a whole ecosystem that must be refined by endless ceremonies of renewal and realignment that unite Aboriginal peoples with its uniqueness or topistic integrity. The forces within a space can be analogized as frequencies from an enfolded realm.

Sharing space links those who belong to the land. In this sense, the law of belonging to the land means maintaining a series of spaces, such as fishing stations, hunting stations, and harvesting stations, renewed again and again by specific kinds of behaviours and ceremonies. These ecological spaces are not self-renewing. Shared knowledge about maintaining a particular spaces penetrates Aboriginal law and manifests shared values, beliefs, traditions, and customary behaviours. The law and teachings not only determine what is physically available to the families – what they can use – but also regulate their choices about the rate of resource use, and whether to modify their resources to increase the availability of useful resources. Aboriginal law allocates among allied families and friends the responsibility for managing the resources, and creates a customary transnational trading code with other nations and peoples to increase choices and resources.

2. An Anishinabek Creation Story

Origin stories say a great deal about how people understand their place in the universe and their relationship to other living things. The dominant creation story of the Europeans who migrated to North America is found in Chapter One of the King James' version of the Book of Genesis:

27. So God created man in his *own* image, in the image of God created he him; male and female created he them.

28. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

Man is seen as the pinnacle of creation. After the Fall, Man is set to rule over Woman, and to till the cursed ground. Subjection abounds. Out of this hardship, a division of lands and labour emerges. Both agriculture and this origin story travel northward to flourish in Europe and England.

This story, although widely travelled, is not universal. The Anishinabek peoples indigenous to the Great Lakes, have their own creation story. The centre of Anishinabek creation is not Eden but Michilimakinac, an island in the strait which separates Lake Huron from Lake Michigan. The earliest recorded version of this story is found in the memoirs of Nicolas Perrot, a French colonial official who travelled throughout the Great Lakes region in the late 1600's. Portions of his memoir, including the creation story, were translated and published by E.H. Blair in *The Indian Tribes of the Upper Mississippi and the Region of the Great Lakes* (Cleveland: The Arthur H. Clark Company, 1911):

...They believe that before the world was created there was nothing but water; that upon this vast extent of water floated a great wooden raft, upon which were all the animals, of various kinds, which exist on earth; and the chief of these, they say, was the Great Hare. He looked about for some spot of solid ground where they could land; but as nothing could be seen on the water save swans and other river-birds, he began to be discouraged. He saw no other hope than to induce the beaver to dive, in order to bring up a little soil from the bottom of the water; and he assured the beaver, in the name of all the animals, that if he returned with even one grain of soil, he would produce from it land sufficiently spacious to contain and feed all of them. But the beaver tried to excuse himself from this undertaking, giving as his reason that he had already dived in the neighborhood of the raft without finding there any indication of a bottom. Nevertheless, he was so urgently pressed to attempt again this great enterprise that he took the risk of it and dived. He remained so long without coming to the surface that those who had entreated him to go believed that he was drowned; but finally he was seen appearing, almost dead, and motionless. Then all the other animals, seeing that he was in no condition to climb upon the raft, immediately exerted themselves to drag him up on it; and after they had carefully examined his claws and tail they found nothing thereon.

Their slight remaining hope of being able to save their lives induced them to address the otter, and entreat him to make another effort to search for a little soil at the bottom of the water. They represented to him that he would go down quite as much for his own welfare as for theirs; the otter yielded to their just expostulations. He remained at the bottom longer than the beaver had done, and returned to them in the same condition as the latter, and with as little result.

The impossibility of finding a dwelling-place where they could maintain themselves left them nothing more to hope for; when the muskrat proposed that, if they wished, he should go to try to find a bottom, and said that he also believed that he could bring up some sand from it. The animals did not depend much on this undertaking, since the beaver and the otter, who were far stronger than he, had not been able to carry it out; however, they encouraged him to go, and even promised that he should be ruler over the whole country if he succeeded in accomplishing his plan. The muskrat then jumped into the water, and boldly dived; and, after he remained there for nearly twenty-four hours he made his appearance at the edge of the raft, his belly uppermost, motionless, and his four feet tightly clenched. The other animals took hold of him, and carefully drew him up on the raft. They unclosed one of his paws, then a second, then a third, and finally the fourth one, in which there was between the claws a little grain of sand.

The Great Hare, who had promised to form a broad and spacious land, took this grain of sand, and let it fall upon the raft, when it began to increase; then he took a part of it, and scattered this about, which caused the mass of soil to grow larger and larger. When it had reached the size of a mountain, he started to walk around it, and it steadily increased in size to the extent of his path. As soon as he thought it was large enough, he ordered the fox to go to inspect his work, with power to enlarge it still more; and the latter obeyed. The fox, when he ascertained that it was sufficiently extensive for him to secure easily his own prey, returned to the Great Hare to inform him that the land was able to contain and support all the animals. At this report, the Great Hare made a tour throughout his creation and found that it was incomplete. Since then, he has not been willing to trust any of the other animals, and continues always to increase what he has made, by moving without cessation around the earth. This idea causes the savages to say, when they hear loud noises in the hollows of the mountains, that the Great Hare is still enlarging the earth; they pay honours to him, and regard him as the deity who created it. Such is the information which those peoples give us regarding the creation of the world, which they believe to be always borne upon that raft. As for the sea and firmament, they assert that these have existed for all time.

This first chapter says much about Anishinabek notions of leadership and land. The Great Hare may be chief among the animals, but he is not despotic. His authority depends upon persuasion, not coercion. The dilemma of the landless animals is shared and resolved by cooperation and bravery. The point of creating land is for mutual sustenance, not personal gain. Creation is the continuing act of the Great Hare. The Anishinabek honour him as a living, creative force. Notice that in this account, there are no humans on the raft. Their genesis is described in the next chapter:

After the creation of the earth, all the other animals withdrew into the places which each kind found most suitable for obtaining therein their pasture or their prey. When the first ones died, the Great Hare caused the birth of men from their corpses, as also from those of the fishes that were found along the shores of the rivers which he had formed in creating the land. Accordingly, some of the savages derive their origins from a bear, others from a moose, and others similarly from various kinds of animals; and before they had intercourse with the Europeans they firmly believed this, persuaded that they had their being from those kinds of creatures whose origin was as above explained. Even today the notion passes among them for undoubted truth, and if there are any of them at this time who are weaned from believing this dream, it has been only by dint of laughing at them for so ridiculous a belief. You will hear them say that their villages each bear the name of the animal which has given its people their being – as that of the crane, or the bear, or of other animals.

The Anishinabek understand themselves as descended from the first animals who participated with the Great Hare in the act of creating the land above the waters. Each of the animal progenitors helped to shape the landscape of their countries for the sustenance of their animal and human descendants:

...The Nepissings (otherwise called the Nipissiniens), Amikoüas, and all their allies assert that the Amikoüas, which term means descendants of the beaver, had their origin from the corpse of the Great Beaver, whence issued the first man of that tribe; and that this beaver left Lake Huron, and entered the stream which is called the French River. They say that as the water grew too low for him, he made some dams, which are now rapids and portages. When he reached the river which has its rise in [Lake] Nepissing, he crossed it, and followed [the course of] many other small streams which he passed. He then made a small dike of earth; but, seeing that the flood of the waters penetrated it at the sides, he was obliged to build dams at intervals, in order that he might have sufficient water for his passage. Then he came to the river which flows from Outenulkamé, where he again applied himself to building dams in places where he did not find enough water – where there are at the present time shoals and rapids, around which one is obliged to make portages. Having thus spent several years in his travels, he chose to fill the country with the children whom he left there, and who had multiplied wherever he had passed, laboriously engaged in the little streams which he had discovered along his route; and at last he arrived below the Calumets. There he made some dams for the last time, and, retracing his steps, he saw that he had formed a fine lake; and there he died. They believe that he is buried to the north of this lake toward the place where the mountain appears to have the shape of a beaver, and that his tomb is there; this is the reason why they call the place where he lies “the slain beaver.” When those peoples pass by that place, they invoke him and blow [tobacco] smoke into the air in order to honor his memory, and to entreat him to be favorable to them in the journey they have to make.

For the Anishinabek, the Great Lakes region is more than geography. It is a spiritual landscape formed by and embedded with the regenerative potential of the First Ones who gave it form.

This creation story has shaped both Anishinabek self-understanding and their notions of territoriality and property. The following account of an 1840 Renewal Council between the Six Nations (Nahdooways) and the Anishinabek (Ojebways) demonstrates the connection between people-descended-from-animals and place:

Chief Yellowhead rose up and made a speech and exhibited the great Wampum belt of the Six Nations, and explained the talk contained in it. This Wampum was about 3 feet long and 4 inches wide. It had a row of White Wampum in the centre, running from one end to the other, and the representations of wigwams every now and then, and a large round wampum tied nearly the middle of the Belt, with a representation of the sun in the centre. Yellowhead stated that this Belt was given by the Nahdooways to the Ojebways many years ago - about the time the French first came to this country. That the great Council took place at Lake Superior - That the Nahdooways made the road or path and pointed out the different council fires which were to be kept lighted. The first marks on the Wampum represented that a council fire should be kept burning at the Sault St. Marie. The 2nd mark represented the Council fire at the Manitoulin Island, where a beautiful White fish was placed, who should watch the fire as long as the world stood. The 3rd Mark represents the Council fire placed on an Island opposite Penetanguishene Bay, on which was placed a Beaver to watch the fire.

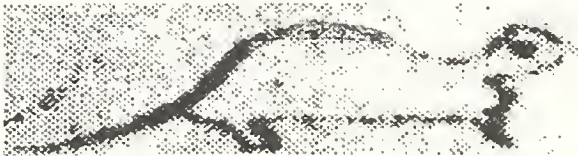
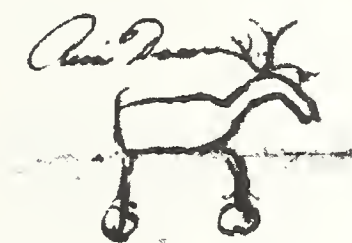
The 4th mark represents the Council fire lighted up at the Narrows of Lake Simcoe at which place was put a White Rein Deer. To him the Rein Deer was committed the keeping of this Wampum talk. At this place our fathers hung up the Sun, and said that the Sun should be a witness to all what had been done and that when any of their descendants saw the Sun they might remember the acts of their forefathers.

At the Narrows our fathers placed a dish with ladles around it, and a ladle for the Six Nations, who said to the Ojebways that the dish or bowl should never be emptied, but he (Yellowhead) was sorry to say that it had already been emptied, not by the Six Nations on the Grand River, but by the Caucanawaugas residing near Montreal.

The 5th Mark represents the Council fire which was placed at this River Credit where a beautiful White headed Eagle was placed upon a very tall pine tree, in order to watch the Council fires and see if any ill winds blew upon the smoke of the Council fires. A dish was also placed at the Credit. That the right of hunting on the north side of the Lake was secured to the Ojebways, and that the Six Nations were not to hunt here only when they come to smoke the pipe of peace with their Ojebway brethren.

The path on the Wampum went from the Credit over to the other side of the Lake the country of the Six Nations. Thus ended the talk of Yellowhead and his Wampum.

Chief Yellowhead was a White Rein Deer chief. He drew his authority from his fathers and grandfathers before him back to the first White Rein Deer. When he signed treaties, he drew the figure of a Rein Deer. The Beaver chiefs could point the burial mountain of the Great Beaver within their traditional territory. Land surrenders covering Beaver Country were signed by chiefs drawing Beaver marks. Genealogy and



territory are fused in a spiritual landscape.



